UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS

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In re
JOHN F. DATOR and JOANN N. DATOR,
Debtors

Chapter 7
Case No. 98-15046-JNF

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MEMORANDUM

The matter before the Court is the Debtors' Motion to Reopen their 1998 case for the purpose of filing motions to avoid judicial liens that impair an exemption claimed in their real estate. Judicial lienholders, Sovereign Bank, formerly known as Compass Bank for Savings, and Household Bank, object to the Motion to Reopen raising the defense of laches. The Court heard the Motion on June 6, 2006 and took that matter under advisement. All parties have filed briefs addressing issues raised by the Court, including whether the value of property for purposes of lien avoidance is the value on the petition date, and whether a motion to reopen changes the rule that the value of the debtor's property is determined on the date of the petition.

The background facts, with the exception of the value of the property, are not in dispute. The Debtors filed a voluntary Chapter 7 petition on May 22, 1998. They received

a discharge approximately three months later on August 31, 1998, and their case was closed on September 19, 1998. Almost eight years later, on April 21, 2006, the Debtors moved to reopen their 1998 case, representing that their former attorney, now retired, improperly failed to file motions to avoid the judicial liens that allegedly impair their homestead exemption with respect to property located at 159 Kaufman Road, Somerset, Massachusetts (the "property").

The Debtors represented in their brief that they elected the federal exemptions under 11 U.S.C. 522(d)(1) in the aggregate amount of $32,250 and that the value of the property at the time they filed their petition was $130,000 and approximately $315,000 today. They add that their residence was encumbered by a first mortgage equal to the value of their real estate at the petition date, and a mortgage in the sum of $900,000, which extended to other property once owned by the Debtors, as well as the judicial liens held by Sovereign Bank and Household Bank, in the sums of $45,000 and $5,000 respectively. With the accrual of interest, these judicial liens are substantially greater today. The Debtors also represented that they intended to avoid the judicial liens of Sovereign Bank and Household Bank and so indicated in their Statement of Intention. They did not, however, file motions to avoid the judicial liens while their case was pending or with their Motion to Reopen. Thus, they did not apply the formula set forth at 11 U.S.C. § 522(f)(2)(A) using either the value of the property at the commencement date or the value of the property today, namely $315,000. Finally, during the hearing, the Debtors, through their counsel, averred that the $900,000 mortgage will be satisfied, pursuant to a settlement agreement, with a payment of $10,000.

The judicial lienholders, Sovereign Bank and Household Bank, oppose the Debtors' Motion to Reopen citing prejudice to their secured positions. Sovereign Bank, in particular, cited expenses associated with its obtaining an execution and levying on that execution, as well as attorneys' fees incurred in conjunction with the Debtors' inquiries as to its status and settlement options in 2004 and again in 2006. Neither judicial lienholder, however, attempted to quantify or even estimate the total costs and expenses associated with their defense of laches.

In In re Levy, 256 B.R. 563 (Bankr. D. N.J. 2000), the bankruptcy court succinctly summarized applicable law. It stated:

> Bankruptcy Code section 350(b) provides that "a case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." *See* 11 U.S.C. § 350(b). Section 522 lien avoidance has been recognized as sufficient cause for reopening a case under section 350(b), because lien avoidance affords relief to a debtor. *See* Matter of Caicedo, 159 B.R. 104, 105-06 (Bankr. D. Conn. 1993) (cases cited). Significantly, neither section 350(b), nor section 522(f), the lien avoidance provision Levy seeks to invoke, sets time limits within which the respective motions must be brought. *See* Matter of Bianucci, 4 F.3d 526, 528 (7th Cir. 1993); *see also* In re Procaccianti, 253 B.R. 590, 591 (Bankr. D. R.I. 2000); In re McDonald, 161 B.R. 697, 700 (D. Kan. 1993). The result is that a bankruptcy court has broad discretion in deciding whether to reopen a case. *See* Matter of Bianucci, 4 F.3d at 528 (citing Matter of Shondel, 950 F.2d 1301, 1304 (7th Cir. 1991)); *see also* In re Palij, 202 B.R. 27, 30 (Bankr. D. N.J. 1996).

Similarly, in In re Frasier, 294 B.R. 362 (Bankr. D. Colo. 2003), the court observed:

> Passage of time alone--here, over three years from the recording of the two transcripts of judgment, seventeen months from the date of the filing of the petition, and fourteen months from discharge--does not necessarily constitute prejudice to a creditor sufficient to bar the reopening of a case. *See, e.g.*, In re Bianucci, 4 F.3d 526, 528 (7th Cir. 1993) (delay alone would not preclude reopening a case, but delay combined with other factors would bar reopening case); *see also*, In re Parker, 264 B.R. 685, 694 (doctrine of laches

> would not bar reopening of a case for the reason that, while the debtor purposefully left the creditor off his schedules, there was no evidence that the creditor relied on this to her detriment). Unlike other provisions in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, 11 U.S.C. § 522(f) and Fed. R. Bankr. P. 4003(d) do not set forth a deadline for the filing of a lien avoidance motion. Moreover, 11 U.S.C. § 350(b) and Fed. R. Bankr. P. 5010 do not contain any limitation on the time for filing a motion to reopen a case. Fed. R. Bankr. P. 9024(1) also specifically excludes motions to reopen from the 1 year time limitation prescribed by Fed. R. Bankr. P. 60(b).

294 B.R. at 367.

Although the bankruptcy court has discretion to determine motions to reopen, the discretion is circumscribed by the equitable doctrine of laches. According to the court in Levy,

> Laches is an equitable defense which allows a court to dismiss an action when there exists inexcusable delay in instituting an action and prejudice to the non-moving party as a result of the delay. *See* Kepner-Tregoe, Inc. v. Executive Dev., Inc., 79 F.Supp.2d 474, 486 (D. N.J. 1999) (citing Pension Fund v. McCormick Dray Line, Inc., 85 F.3d 1098, 1108 (3d Cir. 1996)). The burden to prove the elements of the defense rests with the party asserting it. *See* U.S. v. Koreh, 59 F.3d 431, 445-46 (3d Cir. 1995) (citing EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69, 80 (3d Cir.), *cert. dismissed*, 469 U.S. 925, 105 S.Ct. 307, 83 L.Ed.2d 241 (1984)).

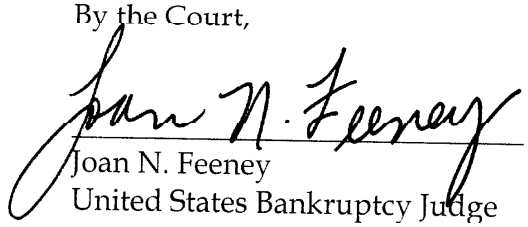
256 B.R. at 565-66. In Levy, the court stated that to establish prejudice a judicial lienholder "must demonstrate that the delay caused it a disadvantage in asserting and establishing a claimed right or defense." Id. at 566 (citing U.S. Fire Ins. Co. v. Asbestospray, Inc., 182 F.3d 201, 208 (3d Cir. 1999)). In Levy, the court accepted the lienholder's argument that a four year delay in seeking lien avoidance caused "the difficult and costly task of hiring an expert real estate appraiser to offer an opinion as to the value of the debtor's property in 1996." Id. The court observed, however, that "[i]f the [debtor's] delay had been excusable,

the prejudice to Goldstein [the lienholder] might have been removed by requiring Levy [the debtor] to pay the difference between the cost of a current appraisal and the cost of an appraisal as of the petition date of more than four years ago." Id. at 566-67 (citing In re Bianucci, 4 F.3d at 529, in which the court stated "[w]hile it may be permissible for a bankruptcy court to condition reopening on reimbursement, we do not believe the court must do so."). Because it found the debtor's delay was inexcusable, the court in Levy determined that the lienholder met its burden of proving the defense of laches. See also Matter of Caicedo, 159 B.R. 104 (Bankr. D. Conn. 1993). *But see* In re Orr, 304 B.R. 875, 878 (Bankr. S.D. Ill. 2004)(defense of laches unavailable where there was no dispute as to the value of the property so that lienholder would not suffer the expense of an appraiser and the valuation would not be speculative).

The Court finds that the Debtors' delay in moving to reopen their 1998 case was unjustified and inexcusable, even if this Court were to accept the Debtors' intimation that their former counsel was negligent in failing to file motions to avoid the judicial liens at issue while their case was pending. Nevertheless, the Court also finds that the judicial lienholders failed to satisfactorily articulate prejudice sufficient to sustain their burden with respect to the defense of laches. Moreover, any prejudice they suffered is both quantifiable and curable. *See* In re Procaccianti, 253 B.R. 590, 592 (Bankr. D. R.I. 2000). Accordingly, in view of the provisions of 11 U.S.C. §§ 350 and 522(f)(2)(A) for which there is no limitations period, and the likelihood that the Debtors would have succeeded and may well succeed in avoiding the judicial liens at issue, regardless of whether the 1998 value or the 2006

value of their property is utilized, the Court shall enter an order granting the Debtors' Motion to Reopen on the condition that the Debtors satisfy the reasonable fees and expenses, including attorneys' fees, of the judicial lienholders between September 19, 1998 and the date they filed their Motion to Reopen.

By the Court,



Joan N. Feeney
United States Bankruptcy Judge

Dated: July 21, 2006
cc: Anthony C. Bucacci, Esq., David Gort Galkin, Esq., Colette Manoil, Esq., Lynne F. Riley, Esq.